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No. _____

In The
Supreme Court of the United States

OCTOBER TERM 2010

SUZANNE BONDS

Petitioner,

vs.

143 NENUE HOLDINGS, LLC and
AMERIQUEST MORTGAGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it "state action" when state statutes are interpreted to conclusively deprive borrowers of state and federal consumer protection rights for contesting nonjudicial foreclosure sales once title to their real property has been transferred at the state recording office following nonjudicial foreclosure auctions, whether known by borrowers to have been held or not, and without borrowers first having the benefit of a judicial determination following notice and a meaningful opportunity to be heard on the merits of their contractual, statutory, and constitutional defenses?

2. If so, does such preclusive "state action" violate the Due Process Clause of the Fourteenth Amendment, and with respect to federal preemptive consumer and disability statutes the Supremacy Clause of the United States Constitution?

3. If so, is the decision of the Hawaii Supreme Court in *Aames Funding Corporation v. Mores*, 107 Haw. 95, 110 P.3d 1042 (2005), unconstitutional?

TABLE OF CONTENTS

I. JURISDICTIONAL STATEMENT. 1

II. AUTHORITATIVE PROVISIONS. 1

III. STATEMENT OF THE CASE 1

A. Introduction 1
B. Factual Background 3
C. Procedural Background 7

IV. LEGAL ARGUMENT. 8

A. Nonjudicial Foreclosures Have Escaped Review . 8
B. Review Of Nonjudicial Foreclosures Is Overdue. 11
C. Bonds' Foreclosure Was "State Action". 18

V. CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

CASES	page
Aames Funding Corporation v. Mores, 107 Haw. 95, 110 P.3d 1042 (2005)	7, 8, 23
Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003), cert. denied, 157 L.Ed.2d 279	7, 8, 14, 23
Barrera v. Security Building & Investment Corp., 519 F.2d 1166 (5th Cir. 1975)	10
Blum v. Yaretsky, 457 U.S. 991 (1982)	12, 16, 17
Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001)	18
Bryant v. Jefferson Federal Savings and Loan Association, 509 F.2d 511 (D.C. Cir. 1974)	10
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	9, 15
Charmicor, Inc. v. Deaner, 572 F.2d 694 (9th Cir. 1978)	10
Cramer v. Metropolitan Savings and Loan Association, 401 Mich. 252 N.W.2d 20 (1977)	10
Federal Home Loan Mortgage Corp. v. Transamerica Insurance Co., 89 Haw. 157, 164, 969 P.2d 1275 (1998)	12

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 14, 17

Fuentes v. Shevin, 407 U.S. 67 (1972) 8, 9, 14

Garner v. Tri-State Development Co., 382 F. Supp. 377 (D. Mich. 1974) 9

Ingraham v. Wright, 430 U.S. 651 (1977) 12

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 13, 15, 16, 17

Kenly v. Miracle Properties, 412 F. Supp. 1072 (D. Az. 1976) 10

Lawson v. Smith, 402 F. Supp. 851 (D. Calif. 1975) 10

Martinez v. California, 444 U.S. 277 (1980) 12

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 16

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) 17

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 8, 9, 14

Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6th Cir. 1975), reversing 372 F. Supp. 594 (1974) 10

Parratt v. Taylor, 451 U.S. 527 (1981) 12

Reitman v. Mulkey, 387 U.S. 369 (1967) 9

Sawada v. Endo, 57 Haw. 608, 561 P.2d 1291 (1977) 24

Scott v. Paisley, 271 U.S. 632, 635 (1926) 11, 12

Shelly v. Kramer, 334 U.S. 1 (1948) 12

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 8, 9, 14

Turner v. Blackburn, 389 F. Supp. 1250 (D. N.C. 1975) 9

United States v. Cruiksank, 92 U.S. 542 (1875) 9

TREATISES

Justice Oliver Wendell Holmes, Collected Legal Papers, p. 187 (1920) 10

Jack Jones & J. Michael Ivens, Power of Sale Foreclosure in Tennessee: A Section 1983 Trap, 51 Tenn. L. Rev. 279, 2890 (1984) 1

Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law, Section 7.29 (3d ed. 1994) 2

Stauffer, Kahana: How The Land Was Lost (2004) 18

PETITION FOR A WRIT OF CERTIORARI

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on or before January 24, 2011, within ninety days of the denial of certiorari review by the Supreme Court of the State of Hawaii on October 26, 2010 of the Hawaii Intermediate Court of Appeals Judgment entered on June 15, 2010 affirming its May 27, 2010 affirmance of the March 23, 2007 decision of the First Circuit Court of the State of Hawaii, pursuant to Section 1257(a) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(1).

II. AUTHORITATIVE PROVISIONS

The decisions being challenged, as in violation of the Due Process and Supremacy Clauses of the United States Constitution are set forth in the Appendix to this Petition.

III. STATEMENT OF THE CASE

A. Introduction

In the 14th and 15th centuries, ruthlessly harsh common law enforcement doctrines emerged in English law regarding real property mortgages, reflecting their relative importance at the time, not the least of which was that if payment was not made precisely on the due date, known as "law day," the mortgagor immediately forfeited all ownership interest in the property whatsoever, Jack Jones & J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 Tenn. L. Rev. 279, 2890 (1984).

"Law day" forfeitures were absolute until the courts of equity in England understandably -- but

belatedly -- intervened, allowing "redemption" after "law day" due to fraud, misrepresentation, accident, or duress, eventually recognizing a general redemption right as itself an equitable estate in land, Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law*, Section 7.29 (3d ed. 1994).

In the United States, most foreclosures today involve a public sale of the property. The most popular form, and the only form available in many states, is that of a *judicial* foreclosure, which as the name implies involves a full, judicially supervised proceeding. A second method is known as a *non-judicial* sale – typically conducted by either a public official or an impartial "trustee" – involving no judicial supervision.

The actual procedures for nonjudicial sales vary widely among states. Hawaii has one of the least protective of borrowers' rights.

Foreclosure practices have emerged today as one of the most serious issues confronting the Nation.

Hawaii's 1874 nonjudicial foreclosure law is one of the most draconian still being strictly enforced today, at the time of the challenged auction here requiring 100% down from the highest bidder immediately following the auction, beforehand uniquely allowing the mortgagee itself to advertise and to conduct the auction and also to record a transfer of title, after merely posting a public auction notice on the premises and publishing three consecutive weekly advertisements, with no open houses, no official transcripts of proceedings, and with prior notice being required except to those junior lien holders previously requesting same, the private transfer of title purportedly being effective upon a mere self-serving affidavit of sale.

B. Factual Background

On February 25, 1998, following the death of her husband, Petitioner ("Bonds") became Successor Trustee of a certain unrecorded Trust Agreement dated April 18, 1990 which held title to their residential property in Honolulu, Hawaii, and on February 26, 1998, Bonds, as Successor Trustee, by Warranty Deed transferred title to herself.

Thereafter, on or about July 9, 2001, Bonds obtained a $500,000.00 Adjustable Rate Note and Mortgage from Respondent Ameriquest Mortgage Company ("Ameriquest"). Her 2001 Note made no mention of Ameriquest having any "power of sale," whereas her 2001 Mortgage stated that "Borrower does hereby mortgage, grant and convey to Lender, with power of sale, the following described property described," and thereafter in its Paragraph 22 states that "if the default is not cured . . . Lender . . . may invoke the power of sale and any other remedies permitted by Applicable Law."

Immediately following her refinancing, on July 20, 2001 Bonds deeded the property back to her Trust.

In mid-May 2004, Bonds received a letter from a purported Mainland agent of Ameriquest, Town & Country Title Services, Inc. ("T&C"), dated May 5, 2004, informing Bonds the subject property had been sold at a nonjudicial auction purportedly conducted on April 2, 2004.

That notice of sale came as a bewildering surprise to Bonds, who at the time was without the mental capacity to understand what was presently transpiring.

Commencing in early 2004, Bonds, 78 years old at the time, living alone, her family members living abroad, necessary care, food, and transportation provided to her by concerned

neighbors and church officials, subsisting through automatic deposits of pension and annuity checks, her bills being paid through automatic payment provisions established for her at the Bank of Hawaii, was mentally and physically disabled.

Bonds had been unable to manage her affairs for herself, suffering from heart failure, dementia, an advanced stage of senility, and psychotic and bi-polar disorders, as clinically diagnosed by attending Honolulu physicians and other skilled professionals at Straub Hospital, Queen's Medical Center, Hale Nani Rehabilitation and Nursing Center, and Wahiawa General Hospital, where she was being cared for.

For example, according to highly regarded, elder care physician R. Gary Johnson, M.D. at Straub Clinic & Hospital on September 8, 2005, only one of several of her physicians so testifying below under oath:

> It is my professional opinion that Suzanne Bonds is not mentally competent. She has a progressive dementia, which is at the more advanced stages and is irreversible . . . and as a result is unable to make decisions regarding her personal care or financial matters.
>
> It is my professional opinion based on her mental status assessment that she has been in this state for at least 2 years.

Furthermore, Bonds complained through physicians and counsel that she had never received any notice of default and intention to accelerate and right to cure required to be sent by Ameriquest pursuant to Paragraph 22 of her Mortgage before Ameriquest had the right to invoke the power of

sale.

On April 2, 2004, T&C had conducted a public auction, advertising the Trust's property with material misdescription, in virtually unreadable, blurred type, and immediately thereafter title was transferred to third-party Respondent 143 Nenue Holdings LLC ("Holding"), named after her street address, by Quitclaim Deed, recorded on May 19, 2004 at the State of Hawaii Bureau of Conveyances.

Bonds' property was sold to Holdings for $634,900.00, leaving excess sale proceeds ("Excess Proceeds") purportedly in the amount of $104,757.61 in the hands of T&C, a California corporation in effect practicing law in Hawaii without a license, conducting the auction sale and issuing legal opinions.

$634,900.00 was egregiously unfair, far below fair market value -- Bonds' property professionally appraised as of February 2, 1997 at $730,000.00, as of July 25, 1999 at $775,000.00, and at time of refinancing with Ameriquest as of June 30, 2001 at $790,000.00, which was three years before the nonjudicial, 100%-down public auction sale took place below, and after she had made numerous improvements to the property, and after the subsequent skyrocketing of Honolulu real property values at the time of the 2004 nonjudicial auction.

When sold to Holdings for $634,900.00, her real property was tax assessed at $1,253,300.00 -- which actual market value at the time of said nonjudicial foreclosure sale, Bonds contended below, was actually between $1,500,000.00 and $1,900,000.00 – or approximately three times what Holdings allegedly paid for it.

Holdings was owned directly by Alala Management, LLC and indirectly by Freddie Franco, arguably known real estate sharks preying upon

financially troubled homeowners, bidding well below true market values at nonjudicial auctions, literally robbing Hawaii borrowers of hundreds of millions of dollars in lost equity, as few interested buyers could put 100% down.

Bonds, when the May 5, 2004, belated auction sale closing notice was delivered to her and subsequently reviewed by a concerned care-giving church official, was assisted in securing legal counsel.

In addition to Bonds' state court contractual rights being violated, Bonds also claimed to have the right to rescind her 2001 Note and Mortgage under federal law, for when that refinancing loan was made, Bonds was not given at closing any fully completed copies of the required federal Truth-In-Lending Act ("TILA") "Notice Of Right To Cancel".

Bonds had instead been given blank-dated copies, giving Bonds the right to rescind said 2001 mortgage loan, which she did below within three years by the timely filing of her rescission in court papers.

Additionally, Bonds being elderly and mentally and physically disabled, through counsel she claimed to be entitled to the protections afforded also by Section 480-13.5, Section 657-13, Section 657-14, and Section 657-21 of the Hawaii Revised Statutes, and by the federal Americans With Disabilities Act of 1990 ("ADA").

Bonds' affairs were being managed by her daughter, Daniele Gortz, living in France, with the assistance of Hawaii counsel, pursuant to a Durable Power of Attorney.

The only interested parties to this Petition are Petitioner and the two named Respondents. All other Defendants were voluntarily dismissed below.

C. Procedural Background

Holdings/Ameriquest's motions to dismiss/for summary judgment on Bonds' Counterclaim opposing ejectment were denied on September 18, 2005.

First, the trial court ruled *as a matter of law* that the opinion of the Hawaii Supreme Court in *Aames Funding Corporation v. Mores*, 107 Haw. 95, 110 P.3d 1042 (2005), interpreting Section 501-118 of the Hawaii Revised Statutes, another of the undersigned's cases, was controlling, protecting Land Court titles once transferred to new owners no matter what contractual and statutory rights had been violated.

Second, the trial court also ruled *as a matter of law* that the opinion of the Ninth Circuit Court of Appeals in *Apao v. Bank of New York*, 324 F.3d 1091 (9th Cir. 2003), *cert denied*, 157 L.Ed.2d 279, another of the undersigned's cases, was *res judicata*, preventing it from considering Bonds' constitutional defenses against ejectment, because no "state action" was involved.

Thus, nothing mattered – not Bonds' common law contractual defenses that her lender had breached her mortgage contract, not her federal statutory defenses based on violations of TILA or ADA, and not even her defenses based upon violations of Due Process of Law or the Supremacy Clause.

For the merits panel in *Apao* decided that a nonjudicial foreclosure was purely consensual, the State of Hawaii taking no part in that lender-borrower relationship supposedly, except to enforce voluntary contractual agreements, but *Apao* had been decided several years before *Aames* which now affirmatively cuts off a borrower's contractual and statutory rights.

Bonds timely appealed to the Hawaii Intermediate Court of Appeals, which agreed with the trial court, concluding that *Aames* and *Apao* controlled, refusing to consider the contractual, statutory, or constitutional merits of her appeal, holding that "once the certificate of title was recorded with the Land Court, title to the property became 'conclusive and unimpeachable," not having been challenged "until after the certificate of title granting Nenue the title to the property was recorded in the Land Court," forgetting the fact that Bonds was not even aware that the auction had occurred in the first place.

Bonds sought timely *certiorari* review in the Hawaii Supreme Court, which was rejected.

IV. LEGAL ARGUMENT

A. Nonjudicial Foreclosures Have Escaped Review

Despite the obvious importance to the American public of protecting their investment in their homes, which for most borrowers in the United States has been one of the biggest financial and emotional investments they will ever make in their entire lifetime, due to the historical roots of the non-judicial foreclosure laws in England and thereafter in the United States, established well before due process rights, it was not until this Court began in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), to develop constitutional procedural due process doctrines requiring notice and an opportunity to be heard, specifically protecting consumers before the loss of valuable economic rights, that borrowers throughout the United States began to question, in both state and federal court proceedings, the constitutionality of confiscatory nonjudicial foreclosure laws.

However, although the Fifth and Fourteenth Amendments prohibit the federal government and

the States from depriving persons of property without due process of law, their purpose had long been understood to protect the people from the state *and not citizens from one another*, *United States v. Cruiksank*, 92 U.S. 542, 554 (1875), and nonjudicial foreclosure processes therefore, no matter how unfair and unjust they might be thought to be, it was earlier thought could not thus be constitutionally attacked unless "state action" could also be shown.

Opponents of nonjudicial sales were nevertheless initially encouraged in the early 1970s by the decisions of this Court, for instance, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), and in *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967), which appeared to open the door to a more liberal interpretation of "state action" in related consumer due process contexts, coupled with this Court's then more recent consumer protection holdings in *Sniadach*, *Fuentes* and *North Georgia Finishing*, *supra*; *see, e.g.*, 387 U.S. at 378, quoting from *Burton*:

> This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance".

And, although at first several district courts, appropriately sifting through the facts, thereafter did conclude that certain state nonjudicial procedures did involve state action and clearly violated procedural due process of law, *Garner v. Tri-State Development Co.*, 382 F. Supp. 377 (D. Mich. 1974), and *Turner v. Blackburn*, 389 F. Supp. 1250 (D. N.C. 1975), most other federal courts were reluctant to rethink the older precedents and refused

in the 1970s to change the older view, finding no state action involved in such recorded auction sales, no matter how blatantly unfair the state nonjudicial foreclosure laws brought before them candidly might appear.

Most notably among these decisions, all revealingly decided within a single twelve-month period, were four bellwether cases, listed in chronological order: *Bryant v. Jefferson Federal Savings and Loan Association*, 509 F.2d 511 (D.C. Cir. 1974); *Barrera v. Security Building & Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975); *Lawson v. Smith*, 402 F. Supp. 851 (D. Calif. 1975); and *Northrip v. Federal National Mortgage Association*, 527 F.2d 23 (6th Cir. 1975), *reversing* 372 F. Supp. 594 (1974), which had found state action to exist.

Based on the *Bryant-Barrera-Lawson-Northrip* line of cases, other courts were quick to find no "state action" in nonjudicial foreclosure sales within their jurisdictions; *see, e.g., Kenly v. Miracle Properties*, 412 F. Supp. 1072 (D. Az. 1976); *Cramer v. Metropolitan Savings and Loan Association*, 401 Mich. 252, 258 N.W.2d 20 (1977); including in the Ninth Circuit in *Charmicor, Inc. v. Deaner*, 572 F.2d 694 (9th Cir. 1978) (specifically upholding Nevada's nonjudicial foreclosure law procedures at that time).

Lost in the reasoning of these courts was one of Justice Oliver Wendell Holmes' most remembered teachings, *Collected Legal Papers*, p. 187 (1920):

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

B. Review Of Nonjudicial Foreclosures Is Overdue

The fact that those earlier decisions found no state action in the nonjudicial foreclosure procedures which they examined, should no longer be thought determinative, generations later, on the specific facts here, for several important reasons:

First, not only has mortgage lending throughout the United States, and the federal regulatory scheme governing residential mortgage lending, both dramatically changed since the mid-1970s;

Second, not only do the vast majority of residential mortgages in the United States now involve various forms of state action due to official involvement in and encouragement of the secondary mortgage market and Fannie Mae and Freddie Mac and HUD; but

Third, the Hawaii 1874 Section 667-5 nonjudicial foreclosure statute after *Aames* today operates in a way substantially dissimilar from those nonjudicial foreclosure statutes previously found in the mid-1970s not to have involved state action.

This Court in its entire history has yet to directly address the important constitutional issue concerning nonjudicial foreclosures in the context of state action.

The closest that this Court has come to the precise issue here was 85 years ago in *Scott v. Paisley*, 271 U.S. 632, 635 (1926) ("the validity of such a contractual power of sale is unquestionable"), when -- without however discussing "state action" or confronted with a nonjudicial foreclosure sale, the issue before this Court then being only as to notice – this Court rejected a constitutional attack on a Georgia statute which at that time allowed a trustee holding title as security by deed under a mortgage to obtain a judicial judgment by exercising its power of sale therein without notice to the borrower, a result

that few would suggest would be upheld today.

Paisley is clearly inapposite here for many reasons, including the fact that it involved judicial intervention to rubber-stamp the trustee's transfer of title, and also since Hawaii is a "lien theory" state, *Federal Home Loan Mortgage Corp. v. Transamerica Insurance Co.*, 89 Haw. 157, 164, 969 P.2d 1275, 1282 (1998), title in Hawaii remaining with the borrower until foreclosed upon, notwithstanding any "power of sale" clause contained in the mortgage document.

In considering "state action," this Court has more recently repeatedly indicated that a three-step analysis is required to determine whether there has been a procedural due process violation as that alleged here:

First, there must exist a deprivation by the state or by a private person or entity who may fairly be treated as the state ("state action"), of, second, a constitutionally cognizable life, liberty, or property interest, without, three, due process of law.

This Court initially took a two-prong approach where no "state action" inquiry was required, *Ingraham v. Wright*, 430 U.S. 651, 672 (1977), which was expanded to include a "state action" test in *Martinez v. California*, 444 U.S. 277, 284-285 (1980); but also *Parratt v. Taylor*, 451 U.S. 527, 536-537 (1981), adding a fourth, "acting under color of state law," not however applicable here.

If one of the present three recognized issues is missing, the challenged statute, it is said, is not a violation of due process, no matter how discriminatory or wrongful the conduct may be. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982), citing with approval *Shelly v. Kramer*, 334 U.S. 1, 13 (1948).

The "state action" three-prong test is definitely satisfied by the conclusively presumptive interpretation given to Land Court nonjudicial foreclosures by the Hawaii Supreme Court in *Aames*.

This Court has recognized that the task of determining whether state action exists in a given context is not as simple as it might appear, since few cases raise the issue in instances where the federal government or a state acts directly, or a private person acts without any involvement whatsoever by the federal government or a state.

Instead, the issue is usually, as here, presented on "middle ground" facts where the challenged conduct is neither purely state action, nor purely private action.

As this Court explained in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 349-350 (1974), for instance:

> While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether a particular conduct is "private," on the one hand, or "state action," on the other, frequently admits of no easy answer.

This Court has itself had difficulty in its own decisions determining when "state action" can or cannot be said to exist in a given set of facts, only able to identify in general language, usually by a split vote, at least three situations in which "private action" is said, at least theoretically, to rise to the level of "state action" so as to invoke due process guarantees.

It is submitted, to be candid with this Court, that none of these "tests" by themselves, despite being expressly voiced in prior cases, has really been especially helpful in understanding or in apparently deciding those cases, representing in reality not "triggers of thought" -- as it were -- but merely "conclusions of thought," serving as convenient rationalizing *labels* once judges have or have not first found state involvement to be extensive enough so as to warrant in individual circumstances,

presumably on underlying and compelling public policy grounds, a finding of "state action" for due process purposes in what were considered to be appropriate cases.

First, a state will be held responsible, it has been said, for "private action" if it encourages or commands it, but not merely if it only acquiesces in it by simply delineating the situations in which private, contractually-acquired rights can be carried out if so elected by the parties (*the encouragement nexus*), *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding that a private warehouseman's sale under a UCC self-help provision did not there constitute "state action"); *see Apao, supra.*

It should be noted, however, that even in *Flagg*, this Court was closely divided -- five-to-three -- in finding no "state action," the minority, relying on its prior consumer protection decisions, such as in *Sniadach*, *Fuentes*, and *North Georgia Finishing*, *supra*, viewed the majority's "encouragement test" as constitutionally blurry.

Instead, the minority in *Flagg* emphasized the state's traditional role in lien execution by forced sale, not unlike the situation in the enforcement of nonjudicial foreclosures at least in "lien theory" states such as Hawaii, and emphasized that New York had thus by statute authorized the warehouseman to perform a forced sale which was clearly to them a state function, and criticizing the majority for approaching the "state action" issue before it "as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, 'a monolithic, abstract concept hovering in the legal stratosphere,'" 436 U.S. at 168.

Second, a state will be held responsible, it has been said, for "private action" where a private person, according to other decisions of this Court, is permitted to perform traditionally exclusive government functions (*the governmental function*

nexus), *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974) (holding that a utility company's termination of service did not constitute "state action," although it was a partial monopoly, because state law imposed no obligation on the state to furnish utility services and the termination procedures were not required by the state but merely permitted by its procedures).

The Court in *Jackson* however was also split, six-to-three, with Justice Douglas the most vocal critic of the then majority, demonstrating as a practical matter how uncertain the Court's "state action" jurisprudence has actually been as a barometer for future cases, 419 U.S. at 361-362:

> In Burton v. Wilmington Parking Authority, 365 US 715, 6 L. Ed 2d 45, 81 S Ct 856 (1961), we said: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance,". . . . As our subsequent discussion in Burton made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. . . . It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.

Third, a state will be held responsible, it has been said, for "private action" if the state and those acting privately have a mutually dependent or "symbiotic" relationship (*the interdependence nexus*), *Burton v. Wilmington Parking Authority*,

365 U.S. 715 (1961) (finding state action where a state parking authority built a parking facility which included commercial shop space, and one of its private restaurant lessees served only white persons), *supra*.

However, although the interdependence nexus is still occasionally referred to in the cases, its obviously unhelpful vagueness has resulted in it rarely being of assistance in such decision making, again representing more the "conclusion of thought" than an actual "trigger of thought"; *see, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (again a six-to-three decision, the majority finding no state action where a private club licensed by the state liquor board was said to discriminate); and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (another six-to-three divided court on the issue of state action).

More relatively recent decisions further illustrate the ease with which such tests can be articulated, yet how their application in individual cases has brought continually sharp disagreement among the Justices of this Court.

In *Blum v. Yaretsky*, 457 U.S. 991 (1982) (concluding that a nursing home's decision to discharge or transfer Medicaid patients to lower levels of care was not state action), for instance, this Court, by a majority of six, with one Justice concurring on other grounds and with two Justices dissenting, although appearing to agree on what are the state-action tests in general, saw the facts before them entirely differently.

The methodology of the majority in *Blum* was to focus first on what they termed "the gravamen of plaintiff's complaint," 457 U.S. at 1003, by first deciding "whether the private motives which triggered the enforcement of those laws can fairly be attributed to the State," *id.* at 1004, and then to determine, second, if the private conduct was extensively regulated, third, whether the state exercised coercive powers or encouraged either

overtly or covertly the private act, *or*, fourth, whether the private party exercised powers that are "traditionally the exclusive prerogative of the State," *id.* at 1004-1005.

The dissenters in *Blum* instructively did not quarrel with the tests, only with how the majority applied the law to the facts, 457 U.S. at 1013-1014:

> The Court today departs from the Burton precept, ignoring the nature of the regulatory framework presented by this case in favor of the recitation of abstract tests and a pigeonhole approach to the question of state action. But however correct the Court's tests may be in the abstract, they are worth nothing if they are not faithfully applied. Bolstered by its own preconception of the decision making process challenged by respondents, and of the relationship between the State, the nursing home operator, and the nursing home resident, the Court subjects the regulatory scheme at issue here to only the most perfunctory examination. The Court thus fails to perceive the decisive involvement of the State in the private conduct challenged by the respondents.

Still more recently, in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (a state political party's imposition of a fee as a condition for participating in its nominating convention held subject to the pre-clearance requirements of the Voting Rights Act), this Court was even more sharply divided on the issue of state action, 517 U.S. at 275, this time five Justices finding "state action," which led several dissenting Justices to then question whether the Court was abandoning the stricter "state action" requirements announced decades earlier in *Jackson*, *Blum*, and *Flagg*, *supra*. See also the later five-our split decision in

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001) (the majority adhering to a "close nexus" test, while the minority favoring a "state attribution" test.

It is within that confusing, uncertain, and maze-like changing body of precedent that this Court must now "sift through the relevant facts" and "weigh the relevant circumstances," to determine whether the specific, century-old, nonjudicial foreclosure statute challenged here as applied to Bonds,, and in so doing to determine if the case precedents, which a quarter of a century ago often viewed nonjudicial foreclosure procedures as merely "private action" resulting from the private choices of contracting parties only, are consistent with the modern realities of the national secondary mortgage market, the present federal and state regulatory rights of borrowers, and the newly expanding consumer protection statutes, as well as due process of law.

C. Bonds' Foreclosure Was "State Action"

The decision below was not made on the merits, but was a dismissal as a matter of law, as the lower court conceded at the September 16, 2005, hearing, based entirely on *Aames* and *Apao* exclusively: "MR. DUBIN: It was not a motion for summary judgment. THE COURT: Right. Right. MR. DUBIN: It was a motion to dismiss. THE COURT: Right." Transcript of Proceedings for September 16, 2005, page 24 (line 25), page 25 (lines 1-4).

First, Hawaii's Section 667-5 is a vicious throwback to the historic theft of land from the ethnic Hawaiians. Indeed, the application of Section 667-5 has been riddled with fraud since its passage.

Relevant excerpts, for instance, from University of Hawaii Professor Stauffer's published work, *Kahana: How The Land Was Lost* (2004), expose the abuses of Section 667-5 before the recent

surprise resurrection of Section 667-5 by Mainland mortgage lenders operating in Hawaii, buttressed by a few title companies seeking to make an extra buck as the expense of Hawaii homeowners, most notably:

> The 1874 Act uses "mortgage" in a manner that bears almost no resemblance to the modern meaning of the term. Homes were put up as collateral for large loans for purely personal purposes. It permitted very high interest rates, and very short terms (often 2-3 years). It permitted a lender to unilaterally auction off a borrower's deed without judicial review. The only notice required could be placed in a paper's legal notices' section. The Act apparently permitted auction bidders to conspire with the lender to secure the deed. . . . "Mortgages" of the form allowed under the 1874 Act . . . are prone to result in the loss of the borrower's home and land, a fact that occurred with deadening regularity in Hawai`i in the late 19th century.
>
> The speculator-investors who made use of the 1874 "Mortgage" Act were major actors in the alienation of Hawaiians from their land. They were of varying political stripes, from annexationist to Royalist. Castle [for example] appears to have been actively prospecting for land in Kahana, and mortgages were the tool he used in acquiring land titles. Hawaiians' cultivated lands, however – the priceless kuleana holdings – seriously began to be lost after the advent of the egregious Mortgage Act of 1874 [Section 667-5].

Second, today, the use of Section 667-5 additionally is carefully orchestrated by federal housing agencies who, behind the scenes, are controlling the language of virtually all mortgages nationwide, including without explanation therein its mandatory "power of sale" clauses, and not only the mandatory use of Section 667-5 in Hawaii, but the fees of Hawaii foreclosing counsel as well, as shown in their own policy statements, requiring special permission, for instance, before judicial foreclosure remedies can be utilized, in order to save, as they admit on their official Websites, a few hundred dollars – the equity of Hawaii borrowers being of no consequence to them.

Nonjudicial foreclosures in Hawaii have unfortunately recently accelerated, in large part because the federally chartered mortgage agencies, such as Fannie Mae and Freddie Mac, have been controlling for at least a decade what most Mainland lenders do; this is well documented by the federal agencies own "policy directions" to lenders' attorneys published and printed on the Internet, of which this Court may take judicial notice.

The federally-chartered Mainland agencies, for instance, actually own the subject mortgages (whose form of mortgage containing the unexplained "power of sale" clause is theirs to start with) and who have been controlling not only the nonjudicial foreclosure procedures, but also the ejectment attorneys and their fees, as evidenced, for instance, by Freddie Mac's own published mandates, both to lenders and to their attorneys, taken from Freddie Mac's own official Website archives, some of which truly border on behind-the-scenes outright fraud on this Nation's borrowers and trial courts:

In recent months, our Nonperforming Loans department worked with many of you ["sellers and servicers"] who service Mortgages for us to test the nonjudicial foreclosure process in the State of Hawaii. Historically, foreclosure actions in Hawaii have been conducted under the judicial process. Our analysis has confirmed that the nonjudicial foreclosure process is quicker, easier and less costly than the judicial process. Under the judicial foreclosure process [in Hawaii], the average foreclosure takes from 8 to 10 months to conclude and costs have reached as high as $1,850 [another fraud on our trial courts who are requested to and who award fees and costs several times that]. The nonjudicial process reduces the foreclosure process to as little as 4 months in time and to $1,200 in costs. As a result, effective October 1, 1999, when you refer to one of our Mortgages for foreclosure in the State of Hawaii, you must instruct your attorney or trustee that he or she must use the nonjudicial process. . . . In addition, we are amending the amounts we will reimburse for foreclosures in Hawaii as follows: attorney fees -- $1,200; eviction costs -- $500 [September 30, 1999, Servicer Bulletin, pp. 1-2] [bracketed commentary added].

Effective for all Hawaiian [sic] cases where the first legal action to initiate non-judicial foreclosure occurs on or after October 1, 2001, mortgagees' performance in prosecuting non-judicial foreclosures will be measured according

> to the reasonable diligence time frames provided in Attachment 2 [Mortgagee Letter 2001-19, dated August 24, 2001, pp. 1-2].

The same is true for Fannie Mae, some of whose relevant "announcements" on its official Website archives also seek to trade the savings of a few hundred dollars for the due process rights of Hawaii borrowers, most notably:

> From time to time, we review our foreclosure-related procedures to evaluate their effectiveness and to identify changes that may be appropriate for one reason or another. This announcement discusses several changes . . . changing the predominant method in Hawaii to nonjudicial foreclosure (and requiring our prior approval before using judicial foreclosures in a few new jurisdictions) . . . [Announcement 01-03, dated June 6, 2001, p.1]

> ANNOUNCEMENT 02-04 Summary: Provides new foreclosure bidding instructions for conventional first mortgages designed to assure a third party's bidding at the foreclosure sale will not result in Fannie Mae eventually acquiring the property for more than the total mortgage indebtedness or for less than Fannie Mae's "make whole" amount [in other words, rigging the bidding in advance tied not to market value but to loan amount] [Fannie Mae – Single Family Update Summaries, dated March 29, 2002, page 1] [bracketed commentary added].

Third, then came *Aames* in 2005 after *Apao* -- the Hawaii trial and appellate courts content, albeit feeling compelled thereafter, to ignore contractual rights, TILA, ADA, and even the Fourteenth Amendment and the Supremacy Clause of the United States Constitution, by cavalierly cutting off all such consumer defenses if and when title to Land-Court-registered property following a nonjudicial foreclosure, no matter how defective and no matter how violative of private contract rights or of state or federal law, is merely perfunctorily transferred by State employees at the State Bureau of Conveyances, without judicial supervision or adjudication, to anyone, whether the foreclosing mortgagee or a third-party buyer, even if as in the case of Bonds the borrower did not even have or was prevented by illness or design from having actual knowledge of the nonjudicial foreclosure auction in the first place.

V. CONCLUSION

For all of the foregoing reasons, in Bonds' situation all Members of this Court should readily agree that she was deprived of her Fourteenth Amendment rights and a variety of federal consumer statutory protections no matter what "state action" test is applied.

This Petition it is respectfully submitted, should be granted forthwith pursuant to the Due Process and the Supremacy Clauses of the United States Constitution.

And in so doing, this Court should perform its constitutional duty to review carefully Section 667-5 of the Hawaii Revised Statutes on its merits in light of modern day secondary mortgage market predatory lending realities, and the disgraceful treatment of Petitioner, especially since *Aames*, an elderly and otherwise helpless victim of predatory "state action."

This Petition clearly presents an extraordinarily important question of federal law and the safeguarding of the integrity of federal Congressional consumer protection legislation that has not been and that should be settled by this Court.

Moreover, the special importance to the welfare of this Nation's homeowners of protecting a family's "single most important asset," its residence, has long been recognized, well before the present historic mortgage crisis, not only from an economic point of view, but also for its inherent social values -- as its location often determines where children go to school, where families worship, where family and friends reside, and where the elderly spend their remaining years, in the absence of which borrowers may become dependent on public housing and welfare, if available, and parental control may be lost and marriages may break up as a result, *Sawada v. Endo*, 57 Haw. 608, 616, 561 P.2d 1291 (1977).

It is unthinkable that this Court should remain further silent in the face of such a national and mounting foreclosure crisis and when presented with as tragic a case as this, while predatory lenders through nonjudicial foreclosures especially are allowed to disregard federal statutes and the United States Constitution itself, and turn our state courts into collection agencies for crooks.

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel of Record
FREDERICK J. ARENSMEYER
Attorneys for Petitioner

Honolulu, Hawaii
January 22, 2011

INDEX TO APPENDIX [1]

1. Hawaii Intermediate Court of Appeals Summary Disposition Order Dated 27, 2010 (A-1 through A-7)

2. Hawaii Intermediate Court of Appeals Judgment on Appeal Filed June 15, 2010 (A-8 through A-9)

3. Hawaii Supreme Court of the State of Hawaii Order Rejecting Application for Writ of Certiorari, Filed October 26, 2010 (A-10 through A-11)

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[1] The trial court entered no written findings of fact or conclusions of law

APPENDIX

1. Hawaii Intermediate Court of Appeals Summary Disposition Order, Dated May 27, 2010

No. 28505

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

143 NENUE HOLDINGS, LLC, a Hawaii limited liability company, Plaintiff -Appellee, v. SUZANNE BONDS, aka Suzanne Duong Bonds, Defendant-Appellant

SUZANNE BONDS, Counterclaimant-Appellant v. 143 NENUE HOLDINGS, LLC, a Hawaii limited liability company, Counterclaim Defendant/Crossclaimant-Appellee, and AMERIQUEST MORTGAGE COMPANY, a Delaware corporation, Additional Counterclaim Defendant/Crossclaim Defendant-Appellee and RONALD G.S. AU; RYAN G.S. AU; and NATALIE AU, Additional Counterclaim Defendants-Appellees, and FREDDIE FRANCO; ALALA MANAGEMENT, LLC, a Hawaii limited liability company; and DOES 1 THROUGH 20, Additional Counterclaim Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 05-1-0377)

SUMMARY DISPOSITION ORDER
(By: Nakamura, C.J., Fujise and Leonard, JJ.)

Defendant-Counterclaimant-Appellant Suzanne Bonds (Bonds) appeals from the March 23, 2007 amended final judgment of the Circuit Court of the First Circuit (circuit court). [1]

After a careful review of the issues raised, arguments advanced, applicable law, and the record in the instant case, we resolve Bonds's appeal as follows:

I.

During the pendency of Bonds's appeals in related appeal Nos. 27659 and 27833, (1) Additional Counterclaim Defendants Ronald G.S. Au, Ryan G.S. Au, and Natalie Au (collectively Au) moved to dismiss the counterclaims against them, (2) Plaintiff-Counterclaim Defendant/Crossclaimant-Appellee 143 Nenue Holdings, LLC. (Nenue) moved for summary judgment as to count 13 of Bonds's counterclaim, and (3) Additional Counterclaim Defendant/Crossclaim Defendant-Appellee Ameriquest Mortgage Company (Ameriquest) moved for summary judgment as to count 5 of Bonds's counterclaim. The circuit court granted all three motions and entered judgment in the movants' favor (April 18, 2006 judgment). However, subsequent to Bonds's notice of appeal from the April 18, 2006 judgment, docketed as SC No. 27892, the Supreme Court dismissed SC No. 27892 for lack of appellate jurisdiction due to the April 18, 2006 judgment's failure to satisfy the requirements of Hawaii Revised Statutes (HRS) § 641-1(a) (1993). The circuit court entered an amended final judgment (March 23, 2007 judgment):

1. in favor of Nenue as to all claims in the complaint;
2. in favor of Nenue, dismissing with prejudice Bonds's counterclaim counts 10

---

[1] The Honorable Karen S.S. Ahn presided.

(Superior Title) and 13 (Injunctive Relief Against Section 667-5 as Unconstitutional), and dismissing without prejudice counts 11 (Unfair and Deceptive Acts and Practices), 12 (Infliction of Severe Emotional Distress), 14 (Organized Criminal Racketeering), and 15 (Punitive Damages);

3. in favor of Ameriquest, dismissing with prejudice Bonds's counterclaim counts 1 (Breach of Written Contract), 2 (Breach of the Implied Covenant of Good Faith and Fair Dealing), 3 Wrongful Non-judicial Foreclosure), 4 (Rescission and Reformation Based on Adhesion Clauses), 5 (Injunctive Relief Against Section 667-5 as Unconstitutional), 6 (Unfair and Deceptive Acts and Practices), 9 (Infliction of Severe Emotional Distress), 8 (Punitive Damages), and 9 (Rescission Based on Federal Truth-in-Lending Act Violations);
4. dismissing without prejudice all claims raised in Bonds's counterclaim against Alala and Franco; and
5. in favor of Au as to all claims raised in Bonds's counterclaim against Au.

Bonds filed a notice of appeal from the March 23, 2007 amended judgment, resulting in the present appeal.

II.

Bonds argues that the circuit court's actions constituted state action, subjecting its decisions to constitutional scrutiny, and the circuit court deprived Bonds of her constitutional right to due process of law and to the equal protection of the law in violation of both Section 5 of Article I of the Hawaii State Constitution and the Fifth and

Fourteenth Amendments to the United States Constitution.

III.

This appeal involves Bonds's "constitutional claim" -- counterclaim counts 5 and 13 against Ameriquest and nenue -- which alleged:

> BONDS seeks an order of this Court enjoining the enforcement [of Nenue's title to the property] and declaring Section 667-5 of the Hawaii Revised Statutes unconstitutional pursuant to both the United States Constitution and the Hawaii State Constitution as an unfair deprivation of economic rights, on its face and/or as applied, as "state action" in its enforcement, depriving BONDS of her federal and/or state procedural due process of law rights, lacking minimum procedural due process protections for borrowers in this State, as exemplified in the factual circumstances of this case, were said [nonjudicial sale of/nonjudicially transferred title to] her Land Court property otherwise to be upheld.

In granting Ameriquest and Nenue's motions for summary judgment as to counts 5 and 13, the circuit court based its decision, in the first place, on mootness, citing to HRS § 501-118 (2006) and Aames Funding Corp. v. Mores, 107 Hawai'i 95, 110 P.3d 1042 (2005); however, the circuit court also rejected the merits of Bonds's constitutional claim, citing to Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003), and ruled her claim was barred by *res judicata*, citing to Foytik v. Chandler, 88 Hawai'i 307, 966 P.2d 619 (1998).

Bonds has failed to show error in the circuit court's grant of summary judgment and consequent entry of judgment in Ameriquest and Nenue's favor. In light of Aames Funding and HRS § 501-118, Ameriquest and Nenue were entitled to judgment as a matter of law as Bonds failed to successfully

impeach the foreclosure action before a certificate of title had been issued in Nenue's favor.

In Aames Funding, the Hawaii Supreme Court "surmised from the text of HRS § 501-118[2] that a mortgagor's right to impeach any foreclosure proceeding is expressly limited to the period before entry of a new certificate of title." 107 Hawai'i at 101, 110 P.3d at 1048 (internal quotation marks, brackets, and ellipses omitted; footnote added). Once the certificate of title was recorded with the Land Court, title to the property became "conclusive and unimpeachable." Id. at 103, 110 P.3d at 1050. Therefore, "defenses to mortgages foreclosure upon by exercise of the mortgagee's power of sale must be raised 'prior to the entry of a new certificate of title.'" Id. at 102, 110 P.3d at 1049.

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[2] HRS § 501-118 states:

> Mortgages of registered land may be foreclosed like mortgages of unregistered land.
>
> In case of foreclosure by action, a certified copy of the final judgment of the court confirming the sale may be filed or recorded with the assistant registrar or the deputy after the time for appealing therefrom has expired and the purchaser shall thereupon be entitled to the entry of a new certificate.
>
> In the case of foreclosure, by exercising the power of sale without a previous judgment, the affidavit required by chapter 667 shall be recorded with the assistant registrar. The purchaser or the purchaser's assigns at the foreclosure sale may thereupon at any time present the deed under the power of sale to the assistant registrar for recording and obtain a new certificate. Nothing in this chapter shall be construed to prevent the mortgagor or other person in interest from directly impeaching by action or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title.
>
> After a new certificate of title has been entered, no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or affect the title to registered land.

Here, Bonds did not challenge the foreclosure sale until after the certificate of title granting Nenue the title to the property was recorded in the Land Court, thus title to the property in Nenue became "conclusive and unimpeachable."

Because this court does not have jurisdiction to decide abstract propositions of law or moot cases, the merits of Bonds's claims will not be addressed. Lathrop v. Sakatani, 111 Hawai'i 307, 141 P.3d 480 (2006).

IV.

Accordingly, the Circuit Court of the First Circuit's March 23, 2007 amended final judgment is affirmed.

DATED: Honolulu, Hawai'i, March 27, 2010.

On the briefs:

Gary V. Dubin
For Defendant-Counterclaimant-
Appellant. Chief Judge

Wayne Nasser,
Kirk W. Caldwell, and
Michael R. Vieira,
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for Plaintiff-Counterclaim
Defendant/Crossclaimant-
Appellee 143 Nenue Holdings,
LLC. and Additional
Counterclaim Defendants-
Appellees Freddie Franco and
Alala Management, LLC. Associate Judge

Associate Judge

Jade Lynne Ching,
Laura P. Couch,
(Alston Hunt Floyd & Ing),
For Additional Counterclaim
Defendant/Crossclaim
Defendant/Appellee Ameriquest
Mortgage Company.

2. **Hawaii Intermediate Court of Appeals Judgment on Appeal, Filed June 15, 2010**

No. 28505

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

143 NENUE HOLDINGS, LLC, a Hawaii limited liability company, Plaintiff-Appellee, v. SUZANNE BONDS, aka Suzanne Duong Bonds, Defendant-Appellant

SUZANNE BONDS, Counterclaimant-Appellant v. 143 NENUE HOLDINGS, LLC, a Hawaii limited liability company, Counterclaim Defendant/Crossclaimant-Appellee, and AMERIQUEST MORTGAGE COMPANY, a Delaware corporation, Additional Counterclaim Defendant/Crossclaim Defendant-Appellee and RONALD G.S. AU; RYAN G.S. AU; and NATALIE AU, Additional Counterclaim Defendants-Appellees, and FREDDIE FRANCO; ALALA MANAGEMENT, LLC, a Hawaii limited liability company; and DOES 1 THROUGH 20, Additional Counterclaim Defendants

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST CIRCUIT
(Civ. No. 05-1-0377)

JUDGMENT ON APPEAL
(By: Fujise, J., for the court[3])

Pursuant to the Summary Disposition Order of the Intermediate Court of Appeals of the State of Hawai'i entered on May 27, 2010, the amended final judgment of the Circuit Court of the First Circuit entered on March 23, 2007 is affirmed.

DATED: Honolulu, Hawai'i, June 15, 2010.

FOR THE COURT:

/s/ Alexa D.M. Fujise
Associate Justice

3. **Hawaii Supreme Court of the State of Hawaii Order Rejecting Application for Writ of Certiorari, Filed October 26, 2010**

NO. 28505

IN THE SUPREME COURT
OF THE STATE OF HAWAII

143 NENUE HOLDINGS, LLC, a Hawaii limited liability company, Respondent/Plaintiff-Appellee,

v.

SUZANNE BONDS, aka Suzanne Duong Bonds, Petitioner/Counterclaimant-Appellant,

---

SUZANNE BONDS, Petitioner/Counterclaimant-Appelant,

---

[3] Nakamura, C J., Fujise and Leonard, JJ.

vs.

143 NENUE HOLDINGS, LLC, a Hawaii limited liability company, Counterclaim Respondent/Defendant/Crossclaimant-Appellee, and AMERIQUEST MORTGAGE COMPANY, a Delaware corporation, Respondent/Additional Counterclaim Defendant/Crossclaim Defendant-Appellee and RONALD G.S. AU; RYAN G.S. AU; and NATALIE AU, Respondents/Additional Counterclaim Defendants-Appellees, and FREDDIE FRANCO; ALALA MANAGEMENT, LLC, a Hawaii limited liability company; and DOES 1 THROUGH 20, Respondents/Additional Counterclaim Defendants

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 05-1-0377)

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI

(By: Nakayama, J., for the court[1])

Petitioners' application for writ of certiorari filed on September 13, 2010, is hereby rejected.

DATED: Honolulu, Hawai'i, October 26, 2010.

FOR THE COURT:

/s/ Paula A. Nakayama
Acting Chief Justice

Gary Victor Dubin,
Frederick J. Arensmeyer,
Benjamin R. Brower and
Simeon Vance of the Dubin
Law Offices for petitioner
on the application

[1] Considered by: Nakayama, Acting C.J., Circuit Judge Wilson in place of Recktenwald, C.J, recused, Circuit Judge Nacino, in place of Acoba, J., recused, Circuit Judge Browning, in place of Duffy, J., recused, and Circuit Judge Lee, assigned by reason of vacancy.

185

(2)

No. 10-975

Supreme Court, U.S.
FILED
APR 1 - 2010
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In The
Supreme Court of the United States

SUZANNE DUONG BONDS,

Petitioner,

vs.

143 NENUE HOLDINGS, LLC and
AMERIQUEST MORTGAGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawai`i

RESPONDENT AMERIQUEST MORTGAGE COMPANY'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because Petitioner Suzanne Bonds's ("Petitioner") constitutional claim is barred by Hawai`i statutory and common law.

2. Whether Petitioner's challenge to the non-judicial foreclosure sale is barred by the doctrine of res judicata.

3. Whether a privately conducted non-judicial foreclosure sale constitutes "state action" that implicates Petitioner's federal constitutional rights.

LIST OF PARTIES

Additional counterclaim defendants-appellees below, who are not parties here, were Ronald Au, Ryan Au, and Natalie Au.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Ameriquest Mortgage Company ("Ameriquest"), pursuant to Rule 29.6 of the Rules of the Supreme Court, hereby submits its Corporate Disclosure Statement as follows:

Ameriquest is a privately held company. Its parent company is ACC Capital Holdings Corporation, a privately held company. No publicly held corporation owns 10% or more of Ameriquest's stock.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTES OR OTHER PROVISION INVOLVED	2
I. INTRODUCTION	4
II. STATEMENT OF THE CASE	5
III. REASONS FOR DENYING THE WRIT	12
A. This Court Lacks Jurisdiction To Decide Petitioner's Claim	12
B. Petitioner's Claim Is Barred By Res Judicata	13
C. Even If Petitioner's Claim Were Not Barred, There Is No State Action Upon Which To Base Her Asserted Violations Of The Federal Constitution	17
IV. CONCLUSION	23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Southern California First Nat. Bank, 492 F.2d 324 (9th Cir. 1973) 22

American Bankers Mortg. Corp. v. Federal Home Loan Mortg. Corp., 75 F.3d 1401 (9th Cir. 1996) 18, 19

Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003) 20, 21, 22

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 22

Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522 (1931) 15

Barrera v. Security Building & Investment Corp., 519 F.2d 1166 (5th Cir. 1975) 20, 21, 22

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 14, 16

Fidelity Federal Sav. and Loan Association v. de la Cuesta, 458 U.S. 141 (1982) 23

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 21

Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917) 16

Heiser v. Woodruff, 327 U.S. 726 (1946) 16

Humpherys v. Nager, 962 F. Supp. 347 (E.D. N.Y. 1997) 18, 19

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) 1, 12

TABLE OF AUTHORITIES – Continued

Page

Liberty Mortg. Banking, Ltd. v. Federal Home Loan Mortg. Corp., 822 F. Supp. 956 (E.D.N.Y. 1993) 18

Link v. Wabash R. Co., 370 U.S. 626 (1962) 9

Lodge Number 107 v. Irvis, 407 U.S. 163 (1972) 17

Long v. National Football League, 870 F. Supp. 101 (W.D. Pa. 1994) 17

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 17

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 17

Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708 (9th Cir. 2001) 14

Ross v. Hatfield, 640 F. Supp. 708 (D. Kan. 1986) 17

Tait v. Western Maryland Railway Co., 289 U.S. 620 (1933) 14

Warren v. Government Nat. Mortg. Association, 611 F.2d 1229 (8th Cir. 1980) 19, 20

Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189 (9th Cir. 1997) 14

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

143 Nenue Holdings, LLC v. Bonds, Nos. 27659, 27833, 2007 WL 141315 (Haw. Ct. App. Jan. 19, 2006) 10

143 Nenue Holdings, Inc. v. Bonds, Nos. 27659, 27833, 2007 WL 141185 (Haw. Ct. App. Jan. 18, 2007) 10

143 Nenue Holdings, LLC v. Bonds, No. 28505, 2010 WL 2126481 (Haw. Ct. App. May 27, 2010) 1, 11

Aames Funding Corp. v. Mores, 107 Hawai`i 95, 110 P.3d 1042 (Haw. 2005) 5, 12, 13, 21

Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (Haw. 1969) 14

Markham v. Markham, 80 Hawai`i 274, 909 P.2d 602 (Haw. Ct. App. 1996) 5

Navarro v. Midfirst Bank, No. 26745, 2007 WL 4358975 (Haw. Ct. App. Dec. 13, 2007) 7

STATE STATUTES AND RULES

Haw. Rev. Stat. § 501-118 ..... *passim*

Haw. Rev. Stat. § 667-5 ..... *passim*

Haw. Rev. Stat. Chapter 501 5

Haw. Rev. Stat. Chapter 502 5

Hawai`i Rules of Appellate Procedure Rule 4(a)(1) 8

OPINIONS BELOW

The opinion of the Hawai`i Intermediate Court of Appeals in this action is set forth at *143 Nenue Holdings, LLC v. Bonds*, No. 28505, 2010 WL 2126481, at *1 (Haw. Ct. App. May 27, 2010).

The Hawai`i Supreme Court Order Rejecting Application for Writ of Certiorari is set forth in Petitioner's Appendix at pp. A-9 through A-10.

JURISDICTION

This Court lacks jurisdiction to decide this case because no actual case or controversy exists. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). In this case, Petitioner's claim is barred by Haw. Rev. Stat. § 501-118.

STATUTES OR OTHER PROVISION INVOLVED

Haw. Rev. Stat. § 501-118 (2006 Repl.),[1] which provided:

> **Foreclosure**
>
> Mortgages of registered land may be foreclosed like mortgages of unregistered land.
>
> In case of foreclosure by action, a certified copy of the final judgment of the court confirming the sale may be filed or recorded with the assistant registrar or the deputy after the time for appealing therefrom has expired and the purchaser shall thereupon be entitled to the entry of a new certificate.
>
> In case of foreclosure by exercising the power of sale without a previous judgment, the affidavit required by chapter 667 shall be recorded with the assistant registrar. The purchaser or the purchaser's assigns at the foreclosure sale may thereupon at any time present the deed under the power of sale to the assistant registrar for recording and obtain a new certificate. Nothing in this chapter shall be construed to prevent the mortgagor or other person in interest from directly impeaching by action or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title.

---

[1] This was the statute in effect at the time the relevant facts at issue in this case occurred.

After a new certificate of title has been entered, no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or affect the title to registered land.

Haw. Rev. Stat. § 667-5 (1993), which provided:

Foreclosure under power of sale; notice; affidavit after sale

When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of the condition, give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage. Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.

Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the

> mortgagee's behalf. The mortgagee shall, within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.
>
> The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.
>
> This section is inapplicable if the mortgagee is foreclosing as to personal property only.

I. INTRODUCTION

Petitioner was in default under her note and mortgage for six months before the non-judicial foreclosure sale of her property on April 2, 2004 (the "Sale"). After failing to properly contest the Sale, she has attempted, over the last six years, to set it aside through a series of collateral proceedings. Undaunted by four unsuccessful Hawai`i circuit court proceedings, three unsuccessful appeals to the Hawai`i Intermediate Court of Appeals ("ICA") and two unsuccessful Hawai`i Supreme Court writs, Petitioner now turns to this Court for relief. In essence she belatedly raises one claim: Hawai`i's non-judicial mortgage foreclosure statute, Haw. Rev. Stat. § 667-5, is unconstitutional. Among other reasons, the Petition for Writ of Certiorari ("Writ") should be denied

because (1) an affidavit of foreclosure was recorded and title transferred to the purchaser upon the Sale, thereby rendering Petitioner's claim moot; (2) Petitioner failed to timely raise her constitutional claim contesting the Sale; and (3) there was no state action to implicate Petitioner's federal constitutional rights.

II. STATEMENT OF THE CASE

The Mortgage

Petitioner's former property is located at 143 Nenue Street, Honolulu, Hawai`i, more particularly described as T.M.K. (1) 3-6-005-053 (the "Property"). The Property is registered in the Hawai`i Land Court System.[2] On or about July 9, 2001, Petitioner, as borrower, refinanced the Property with Ameriquest,

[2] There are two systems for recording title to land in Hawai`i. In the "Land Court System," governed by Haw. Rev. Stat. Chapter 501, real property is registered with the Land Court. "The system of land title registration . . . codified in [Haw. Rev. Stat.] chapter 501 is a system for registration of land under which, upon the landowner's application, the court may, after appropriate proceedings, direct the issuance of a certificate of title." *Aames Funding Corp. v. Mores*, 107 Hawai`i 95, 101, 110 P.3d 1042, 1048 (2005) (internal quotation marks and citation omitted). "The purpose of this registration system is to conclusively establish title to land through the issuance of a certificate of title [('TCT')]." *Id.* In the "Regular System," governed by Haw. Rev. Stat. Chapter 502, conveyances of real property are recorded in the Bureau of Conveyances for the purpose of giving "notice to the general public of the conveyance and to preserve the recorded instrument as evidence." *Markham v. Markham*, 80 Hawai`i 274, 281, 909 P.2d 602, 609 (Haw. Ct. App. 1996).

as lender, obtaining a loan in the amount of $500,000 (the "Loan"). The Loan was evidenced by an Adjustable Rate Note executed by Petitioner and dated July 9, 2001 (the "Note"). Record on Appeal ("Record") Vol. II: 156. The Note was secured by a Mortgage on the Property dated July 9, 2001 (the "Mortgage") recorded as Document No. 2721733 and noted on TCT No. 586,754. *Id.* at 137. The Mortgage provided in relevant part that "Borrower does hereby mortgage, grant and convey to Lender, with power of sale," the Property to secure the Loan. *Id.* at 139.

The Non-Judicial Foreclosure Sale

Petitioner defaulted on her loan. Despite notice, Petitioner did not cure the default, and Ameriquest – without the involvement of Fannie Mae or Freddie Mac – exercised the power of sale contained in the Mortgage. *See* Record Vol. II: 164-84. On April 2, 2004, pursuant to Haw. Rev. Stat. § 667-5, the Property was sold to 143 Nenue Holdings, LLC ("Nenue Holdings"), the highest bidder, at a non-judicial foreclosure sale conducted by Town & Country Title Services, Inc. ("Town & Country"). The Sale netted excess proceeds of $104,757.61, which were held by Town & Country. *Id.* at 284. On April 23, 2004, an Affidavit of Foreclosure was recorded in the Land Court. *Id.* On May 19, 2004, a Quitclaim Deed quitclaiming the Property to Nenue Holdings was recorded in the Land Court. *Id.* at 185. On May 19, 2004, a new TCT was issued in favor of Nenue Holdings (TCT No. 697,675). *Id.* at 421.

Petitioner's Special Proceeding

On June 17, 2004, nearly two months after the Affidavit of Foreclosure was recorded, Petitioner instituted a special proceeding to challenge the Sale ("Special Proceeding") by filing a "Motion to Cancel Foreclosure Under Power of Sale" ("Motion to Cancel") in the First Circuit Court of the State of Hawai`i ("Circuit Court").[3] Record Vol. II: 190. Petitioner's Motion to Cancel was based on the theory that Part II – rather than Part I – of Hawai`i's mortgage foreclosure statute[4] applied to the Sale, and that Ameriquest had failed to follow the procedure set forth in Part II. *Id.* at 194. Petitioner did not challenge the constitutionality of the non-judicial foreclosure

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[3] At that time, Petitioner was represented by attorney Ronald Au. Record Vol. II: 27.

[4] In 2004, Hawai`i's mortgage foreclosure statute contained three parts, two of which are relevant for purposes of this discussion. Part I of Haw. Rev. Stat. Chapter 667 governs non-judicial foreclosures, such as the one that took place in this case. Part II, entitled "Alternative Power of Sale Process," provides – as its title suggests – an alternative process to that set forth in Part I for conducting non-judicial foreclosures. So long as the contract between the parties allows it (as was the case here), lenders can select either process to conduct a non-judicial foreclosure sale. *See Navarro v. Midfirst Bank*, No. 26745, 2007 WL 4358975, at *1 (Haw. Ct. App. Dec. 13, 2007) (holding that the lender validly exercised its right to conduct a non-judicial foreclosure sale pursuant to Part I of Haw. Rev. Stat. Chapter 667 rather than Part II because "[a]ccording to the valid terms of the agreement executed between the parties, the lender was given the right to elect the power of sale to be applied during the foreclosure proceedings").

statute in the Special Proceeding. On August 18, 2004, the Circuit Court issued an order denying Petitioner's Motion to Cancel, *id.* at 260, and on November 22, 2004, the Circuit Court entered final judgment in favor of Ameriquest in the Special Proceeding ("Special Proceeding Final Judgment"), *id.* at 266. Petitioner did not file a notice of appeal after the entry of the Special Proceeding Final Judgment, and the time to appeal has lapsed.[5]

Town & Country's Interpleader Action

On September 10, 2004, Town & Country filed a Complaint in Interpleader for the excess proceeds it held as a result of the Sale ("Interpleader Action"). Record Vol. II: 360. Both Town & Country and Ameriquest filed motions for summary judgment seeking, respectively, to interplead the excess proceeds and for attorney's fees and costs. *Id.* at 269, 332. Petitioner opposed both motions, arguing, among other things, that the Circuit Court had no jurisdiction to decide the Special Proceeding.[6] *Id.* at 347. As in the Special Proceeding, Petitioner did not challenge the constitutionality of Haw. Rev. Stat. § 667-5.

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[5] In Hawai`i, "[w]hen a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order." Hawai`i Rules of Appellate Procedure Rule 4(a)(1).

[6] On or before July 2, 2004, Petitioner discharged Ronald Au, who was replaced by Petitioner's current counsel. *See* Record Vol. V: 67.

On April 19, 2005, the Circuit Court entered final judgment in favor of Town & Country. *Id.* at 381. On April 28, 2005 the Circuit Court entered final judgment in favor of Ameriquest.[7] *Id.* at 384. Petitioner did not file a notice of appeal after the entry of the Interpleader Action Final Judgments and the time to appeal has lapsed.

Nenue Holdings's Ejectment Action

Despite the entry of final judgment in both the Special Proceeding and the Interpleader Action, Petitioner refused to vacate the Property. Therefore, on March 7, 2005, Nenue Holdings filed a complaint seeking Petitioner's ejectment ("Ejectment Action"). Record Vol. I: 1. On August 25, 2005, Petitioner answered and filed a counterclaim against several defendants,[8] including Nenue Holdings and Ameriquest ("Counterclaim") alleging, among other things, that Petitioner (1) did not receive proper notice of the Sale, (2) signed the Note and Mortgage without

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[7] These final judgments will be collectively referred to as the "Interpleader Action Final Judgments."

[8] In her Counterclaim, Petitioner also alleged that her former counsel, Ronald Au, committed malpractice by initiating the Special Proceeding. Of course, Petitioner cannot rely on alleged mistakes committed by her former counsel as a reason for relief because in "our system of representative litigation, . . . each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962).

understanding their contents, and (3) did not receive documents required by the Truth In Lending Act. *Id.* at 26. Additionally, Petitioner asserted, for the first time, that Haw. Rev. Stat. § 667-5 was unconstitutional. *Id.* at 47, 51.

Nenue Holdings and Ameriquest filed motions to dismiss. Ultimately, on November 10, 2005, the Circuit Court entered final judgment in favor of Nenue Holdings and Ameriquest on all of Petitioner's claims except for those attacking the constitutionality of Haw. Rev. Stat. § 667-5, which it reserved for further briefing ("November 2005 Final Judgment").[9] Record Vol. V: 1. After supplemental briefing, on March 30 and 31, 2006, the Circuit Court granted summary judgment in favor of Nenue Holdings and Ameriquest. Record Vol. VIII: 64, 67. On April 18,

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[9] On December 5, 2005, Petitioner appealed the November 2005 Final Judgment ("First Appeal"), Record Vol. V: 116. Also on December 5, 2005, Petitioner filed a Notice of Pendency of Action ("NOPA") based on the filing of the First Appeal. *Id.* at 161. On February 21, 2006, the Circuit Court expunged the NOPA ("NOPA Expungement"), Record Vol. VII: 1, which Petitioner appealed ("Second Appeal"), Record Vol. VIII: 37. On January 18, 2007, the Hawai`i ICA dismissed Petitioner's appeal of the NOPA Expungement as moot, *143 Nenue Holdings, Inc. v. Bonds*, Nos. 27659, 27833, 2007 WL 141185, at *1 (Haw. Ct. App. Jan. 18, 2007), and on January 19, 2007, the ICA affirmed the November 2005 Final Judgment, *143 Nenue Holdings, LLC v. Bonds*, Nos. 27659, 27833, 2007 WL 141315, at *1 (Haw. Ct. App. Jan. 19, 2006). On June 7, 2007, the Hawai`i Supreme Court rejected Petitioner's application for writ of certiorari to review the ICA's affirmance of the November 2005 Final Judgment.

2006, the Circuit Court entered final judgment in favor of Nenue Holdings and Ameriquest on Petitioner's constitutional claim. *Id.* at 77. On March 23, 2007, the Circuit Court amended the April 18, 2006 final judgment ("March 2007 Final Judgment"). Petitioner appealed ("Third Appeal").

On May 27, 2010, the Hawai`i ICA, in an unpublished decision, affirmed the March 2007 Final Judgment. *143 Nenue Holdings, LLC v. Bonds*, No. 28505, 2010 WL 2126481, at *2 (Haw. Ct. App. May 27, 2010). The ICA held that Petitioner's constitutional claim was barred by Haw. Rev. Stat. § 501-118:

> [i]n light of *Aames Funding* and Haw. Rev. Stat. § 501-118, Ameriquest and Nenue [Holdings] were entitled to judgment as a matter of law as [Petitioner] failed to successfully impeach the foreclosure action before a [TCT] had been issued in Nenue [Holdings's] favor.

Id., at *2. The ICA did not address the issue whether Haw. Rev. Stat. § 667-5 was constitutional "[b]ecause [the ICA] does not have jurisdiction to decide abstract propositions of law or moot cases[.]" *Id.*

Petitioner applied for certiorari to the Hawai`i Supreme Court, which rejected her application on September 13, 2010. This Writ followed.

III. REASONS FOR DENYING THE WRIT

A. This Court Lacks Jurisdiction To Decide Petitioner's Claim

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 71 (1983) (citation omitted). In this case, Petitioner's injury cannot be redressed by this Court because the Sale was completed almost seven years ago and Haw. Rev. Stat. § 501-118 bars any challenge after the entry of the TCT.

Haw. Rev. Stat. § 501-118 governs the foreclosure of registered land and provides in relevant part that "[n]othing in this chapter shall be construed to prevent the mortgagor or other person in interest from directly impeaching by action or otherwise, any foreclosure proceedings affecting registered land, **prior to the entry of a new certificate of title**." (Emphasis added.) Under this provision, the entry of a new TCT is an absolute bar to any subsequent action to impeach the foreclosure proceeding. *Aames*, 107 Hawai`i at 103, 110 P.3d at 1050.

In *Aames*, a non-judicial foreclosure sale was conducted, and a TCT was issued to the purchaser. *Id.* at 96-97, 110 P.3d at 1043-44. Because the borrowers refused to surrender possession, the purchaser

filed an action for ejectment, whereupon the borrowers attempted to rescind the mortgage. *Id.* at 97, 110 P.3d at 1044. The court "surmised from the text of [Haw. Rev. Stat.] § 501-118 that a mortgagor's right to 'impeach[] . . . any foreclosure proceeding' is expressly limited to the period before entry of a new certificate of title." *Id.* at 101, 110 P.3d at 1048. The court held that because the borrowers did not object to the non-judicial foreclosure sale until after the TCT was issued, "title to the subject property in [the purchaser] became 'conclusive and unimpeachable.'" *Id.* at 103, 110 P.3d at 1050.

The facts of this case are strikingly similar to *Aames*. A non-judicial foreclosure sale was conducted; a TCT in favor of Nenue Holdings was issued; Petitioner refused to surrender possession, forcing Nenue Holdings to file the Ejectment Action; and Petitioner challenged the Sale during the Ejectment Action, rather than prior to the issuance of the TCT. It is a short jump from the result in *Aames* to the ICA's proper conclusion in this case: Nenue Holdings's title to the Property is unimpeachable, and Haw. Rev. Stat. § 501-118 bars Petitioner from the relief she seeks.

B. Petitioner's Claim Is Barred By Res Judicata

Petitioner's failure to challenge the constitutionality of Haw. Rev. Stat. § 667-5 in the Special Proceeding is fatal to her Writ. "A final judgment on

the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *See also Ellis v. Crockett*, 51 Haw. 45, 55, 451 P.2d 814, 821-22 (Haw. 1969) (stating that res judicata "precludes the relitigation . . . of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided") (internal quotation marks and citation omitted). "In order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." *Western Radio Services Co., Inc. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997), *cert. denied*, 519 U.S. 822 (1996) (citing *Blonder-Tongue Lab. v. University of Ill. Found.*, 402 U.S. 313, 323-24 (1971)). All of these elements are present in this case.

First, "[t]he central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts." *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713-14 (9th Cir. 2001). *See also Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, 625 (1933) (res judicata applied where "[t]he very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding"). Here, both the Special Proceeding and Petitioner's constitutional challenge are based on the same set of operative facts: the Sale of the Property. Petitioner's

constitutional challenge, raised for the first time in the Ejectment Action, is a "ground[ ] for recovery which could have been asserted, whether [it was] or not, in a prior suit between the same parties . . . on the same cause of action." Accordingly, an identity of claims exists between the Special Proceeding and the Ejectment Action.

Second, there is a final judgment on the merits. The Circuit Court denied Petitioner's Motion to Cancel, and entered final judgment in favor of Ameriquest. Petitioner did not appeal the Special Proceeding Final Judgment.

Third, there is identity between the parties; both Ameriquest and Petitioner were parties to the Special Proceeding. Thus, all elements of the res judicata test are satisfied.

Additionally, public policy underlying the res judicata doctrine supports barring Petitioner's belated challenge to Hawai`i's non-judicial foreclosure statute. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931).

Here, Petitioner seeks to unreasonably perpetuate the litigation. She has unsuccessfully challenged the Sale in three separate court proceedings (the Special Proceeding, the NOPA Action, and the Ejectment Action) as well as unsuccessfully asserted

claims in another (the Interpleader Action). Petitioner has unsuccessfully appealed three separate times to the Hawai`i ICA and her two writs to the Hawai`i Supreme Court have been rejected. These proceedings and appeals have prolonged a process which should have been completed nearly seven years ago. In sum, Petitioner continues to challenge the Sale even though she failed to appeal the Special Proceeding Final Judgment. This Court has "stressed that '[the] doctrine of res judicata . . . is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts. . . . '" *Moitie*, 452 U.S. at 401 (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Accordingly, res judicata precludes Petitioner from litigating the constitutionality of Haw. Rev. Stat. § 667-5 in the Ejectment Action.[10]

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[10] The allegations in the Petition regarding Petitioner's health and the alleged unfairness of the Sale are irrelevant to the question whether Petitioner's claim is barred by res judicata. "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" *Moitie*, 452 U.S. at 401 (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)).

C. Even If Petitioner's Claim Were Not Barred, There Is No State Action Upon Which To Base Her Asserted Violations Of The Federal Constitution

Petitioner alleges that the Sale violated her Fourteenth Amendment right to due process. Writ, 1.[11] "Because the language of the Fourteenth Amendment is directed at the states, a violation occurs only by conduct that may be fairly characterized as 'state action.'" *Long v. National Football League*, 870 F.Supp. 101, 103 (W.D. Pa. 1994); *Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (Equal Protection Clause "erects no shield" against private conduct) (citation omitted); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 n.18 (1982) (discussing "state-action requirement of the Fourteenth Amendment"). Thus, Petitioner must demonstrate some type of state action in order to assert a claim under the Fourteenth Amendment. *Id.* Petitioner fails to do so.

Petitioner claims the Sale involved state action because "the use of Section 667-5 [] is carefully orchestrated by federal housing agencies[,]" specifically Fannie Mae and Freddie Mac, who "mandate"

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[11] Petitioner also alleges that the Sale violates the Supremacy Clause. Writ, 1. Such a claim also requires the existence of state action. *Ross v. Hatfield*, 640 F.Supp. 708, 712 (D. Kan. 1986) (holding that court lacked subject matter jurisdiction to decide plaintiffs' Supremacy Clause claim because it found "the necessary state action lacking"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001) (discussing circumstances under which Supremacy Clause forecloses state action).

the use of the non-judicial foreclosure process.[12] Writ, 20. However, Petitioner does not even allege that Fannie Mae, Freddie Mac, or any other "federal housing agency" mandated the use of the non-judicial foreclosure process in this case, much less offer any evidence that they did. In fact, neither Fannie Mae nor Freddie Mac was involved with the Sale; the Loan was made by Ameriquest and Ameriquest – not Fannie Mae or Freddie Mac – exercised the power of sale. For this reason alone, Petitioner has failed to establish that the Sale involved state action.

Even if Fannie Mae or Freddie Mac (or any other "federal housing agency," for that matter) were involved with the Sale, those organizations are not state actors. *American Bankers Mortg. Corp. v. Federal Home Loan Mortg. Corp.*, 75 F.3d 1401, 1408 (9th Cir. 1996) ("Freddie Mac is not a government agency subject to the Fifth Amendment's Due Process Clause."), *cert. denied*, 519 U.S. 812 (1996); *Humpherys v. Nager*, 962 F.Supp. 347, 351 (E.D. N.Y. 1997) ("Private parties like Freddie Mac are generally not liable to suit under § 1983 as they are not state actors."); *Liberty Mortg. Banking, Ltd. v. Federal Home Loan Mortg. Corp.*, 822 F.Supp. 956, 957

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[12] This is a new argument for Petitioner; she did not make such a claim in her briefs below. Additionally, Petitioner argues that "Hawaii's Section 667-5 is a vicious throwback to the historic theft of land from the ethnic Hawaiians." Writ, 18. Even if this were true, it is irrelevant to the question whether Haw. Rev. Stat. § 667-5 involves state action.

(E.D.N.Y. 1993) (holding that "Freddie Mac is neither a federal actor nor a state actor" and noting that "the federal courts have uniformly held that Fannie Mae and the Government National Mortgage . . . are not engaged in state action when they undertake various activities").

In all of these cases, the courts examined whether **Freddie Mac** itself was a state actor. *American Bankers*, 75 F.3d at 1411; *Humpherys*, 962 F.Supp. at 351-52; *Liberty Mortgage*, 822 F.Supp. at 960-61. Here, Petitioner does not even attempt to convince this court that Fannie Mae or Freddie Mac are state actors. Instead, she *assumes* they are and that the alleged instructions on their "official Website archives" regarding the use of non-judicial foreclosure proceedings somehow turn the actions of **Ameriquest** into state action. *See* Writ, 20-22. Petitioner assumes too much. As noted above, Fannie Mae and Freddie Mac are not state actors. Thus, their purported instructions as to the use of the non-judicial foreclosure process are irrelevant to the determination whether state action exists in this case.[13]

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[13] Even if Fannie Mae or Freddie Mac had been involved with the Sale (which Petitioner does not allege) their involvement would not in and of itself convert the Sale into state action. *Warren v. Government Nat. Mortg. Ass'n*, 611 F.2d 1229, 1234 (8th Cir. 1980) ("[A] wholly-owned government agency can enforce a valid Contractual provision for foreclosure without running afoul of the constraints of the Fifth Amendment, under all circumstances in which the foreclosure of the same contract

(Continued on following page)

Further, courts have repeatedly held that non-judicial foreclosure proceedings, such as the Sale conducted in this case, cannot be considered state action. *Apao v. Bank of New York*, 324 F.3d 1091 (9th Cir. 2003), *cert. denied sub nom. Apao v. ARM Financial Corp.*, 540 U.S. 948 (2003); *Warren*, 611 F.2d at 1235 (8th Cir. 1980) (stating that "mortgage foreclosures through power of sale agreements such as the one at issue here are not in and of themselves powers of a governmental nature"); *Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166, 1170, 1174 (5th Cir. 1975) (determining that there was "no significant state action . . . involved in non-judicial foreclosures" because there was an "absence of direct state involvement in the act by which the deprivation itself was accomplished").

In fact, in *Apao*, the Ninth Circuit examined a claim identical to the one in this case. Relying on several cases from this Court and sister circuits, the Ninth Circuit concluded that non-judicial foreclosures conducted pursuant to Haw. Rev. Stat. § 667-5 were not state action because "[t]he statute neither encourages nor compels the procedure, but merely recognizes its legal effect." *Apao*, 324 F.3d at 1094. Apao concluded that Haw. Rev. Stat. § 667-5 "merely authorized the parties to contract for the express terms of foreclosure upon default." *Id.* at 1095. The

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by a private lender would be held not to violate the requirements of due process.") (citation omitted).

court held that "[w]hile the bar for state action is low . . . non-judicial foreclosure procedures like Hawaii's nevertheless slip under it for want of direct state involvement." *Id.* (citation omitted).[14]

Petitioner also alleges that state action exists due to "the conclusively presumptive interpretation given to Land Court non-judicial foreclosures by the Hawaii Supreme Court in *Aames*." Writ, 12. Assuming Petitioner is arguing that the Hawai`i courts' denial – pursuant to Haw. Rev. Stat. § 501-118 – of the relief she sought from the Sale amounts to state action, this Court has rejected such a theory. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) ("If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner."). Nor do Haw. Rev. Stats. § 501-118 or § 667-5 constitute state action. *See Barrera*, 519 F.2d at 1170. In *Barrera*, the Eighth Circuit determined that "[t]he appellants' argument that [Tex. Code. Ann.] Article 3810[15] is by itself constitutionally significant state involvement does not withstand examination." *Barrera*, 519 F.2d at

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[14] As in *Apao*, a required element of state action – "'overt official involvement' in the enforcement of creditors' remedies" – is entirely lacking in this case. *See Apao*, 324 F.3d at 1095.

[15] At that time, Article 3810 governed the manner in which non-judicial foreclosure sales were conducted.

1170. The court noted that Article 3810 does not authorize the power of sale. Nor does it even codify the right to contract for and to exercise that power. Certainly it does not compel it." *Id.* at 1170-71. The court determined that there was no state action because the purpose of Article 3810 was to regulate, rather than "aid, support, or encourage foreclosures under powers of sale." *Id.* at 1171.

The same is true of Haw. Rev. Stat. § 501-118, as well as Haw. Rev. Stat. § 667-5. Neither statute authorizes the power of sale, nor do they codify the right to contract for it. Instead, like the non-judicial foreclosure statute in *Barrera*, they regulate the manner in which non-judicial foreclosure sales are conducted. "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept." *Apao*, 324 F.3d at 1095 (quoting *Adams v. Southern California First Nat. Bank*, 492 F.2d 324, 330-31 (9th Cir. 1973)).

Finally, Petitioner argues that this Court has not "directly address[ed]" the constitutionality of "non-judicial foreclosures in the context of state action." Writ, 11. Even if that were true, this Court has upheld the validity of non-judicial foreclosure sales in other contexts. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541-42 (1994) (rejecting challenge to non-judicial foreclosure and holding "that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the

foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with")[16]; *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 170 (1982) (upholding non-judicial foreclosure proceedings instituted pursuant to Federal Home Loan Bank Board regulation that pre-empted state law).

Thus, Petitioner has failed to articulate a compelling reason to grant her Writ. *See* Supreme Court Rule 10(c) (providing that this Court considers whether "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

IV. CONCLUSION

The time for Petitioner to challenge the lawfully conducted, non-judicial foreclosure sale on her property has long passed. Despite failing to (1) raise her constitutional claim in her Special Proceeding or (2) appeal the Special Proceeding Final Judgment, Petitioner has repeatedly challenged and appealed collateral proceedings involving the proceeds from the Sale and possession of the Property. Petitioner's Writ

[16] This puts to rest Petitioner's assertion that the price paid for the Property at the Sale "was egregiously unfair, far below fair market value[.]" Writ, 5.

seeks to continue her challenge nearly seven years after final judgment was entered and the foreclosure sale was consummated. For the many reasons set forth above, Petitioner's Writ should be denied.

Respectfully submitted,

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April 1, 2011

No. 10-975

APR 23 2011

In The
Supreme Court of the United States

OCTOBER TERM 2010

SUZANNE BONDS

Petitioner,

vs.

143 NENUE HOLDINGS, LLC and
AMERIQUEST MORTGAGE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

REPLY BRIEF

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TABLE OF CONTENTS

A. Introduction 1

B. Points in Reply 1

1. Petitioner's Constitutional Claims Are Not Moot 1

2. Petitioner's Constitutional Claims Are Not Barred By Res Judicata 3

3. The Actions Below Were "State Action" 5

C. Conclusion 6

A. Introduction

This Reply Brief is being submitted pursuant to Supreme Court Rule 15.6 in advance of this Court's April 29, 2011 Conference, in the steadfast belief that there is no issue of greater significance before this Court affecting the daily lives of virtually every American citizen today.

The historical ignoring of the constitutionality of mortgage foreclosures in the United States has now pushed this Nation's economy, as well as the economies of the entire world, to the very brink of financial collapse, while still escaping oversight by the federal judiciary as a result frankly of a lack of leadership by this Court.

The facts of this case, in contrast to the desperate attempt in the Opposition Brief of Respondent Ameriquest Mortgage Company, well-known to be one of the worst predatory lenders in the history of the United States, to distort the record below, present this Court with the clearest set of operative facts imaginable, inviting if not compelling this Court's attention after more than 200 years of silence and lack of constitutional oversight.

B. Points in Reply

The Opposition Brief presents three new arguments in response to the Petition, neither of which is valid.

1. Petitioner's Constitutional Claims Are Not Moot.

The Opposition Brief, pages 12-13, merely is content to argue in a circle, claiming that because of the *Aames* decision, the subject of this constitutional challenge, since Petitioner did not challenge the transfer of title beforehand, the issue is now supposedly moot.

First, the transfer of title below occurred on May 19, 2004 when Petitioner, living alone, was "not

mentally competent" and in "advanced stages" of "progressive dementia' (Petition, page 4). It was not until almost one month afterwards, on June 17, 2004, that with the assistance of caregivers at her Church trying to look after her that an attorney was retained to assist her.

Second, Petitioner's defenses, in addition to lack of capacity, were failure of her lender to have given her proper notice of default and proper notice of acceleration (all of which are contractually required as preconditions to foreclosure), and violations of the federal Truth-in-Lending Act ("TILA"), yet none of that matters in Hawaii once title is transferred.

Thus the Opposition Brief tries to assume away precisely what is the actual issue in this proceeding:

> Does a State have the power to constitutionally override the terms and conditions of private contractual agreements and common law defenses arising thereunder, as well as well-established Congressional statutory consumer rights and remedies, by passing laws (so interpreted by its highest court) that cancel such protections wily nily while claiming inconsistently not to be state action?

Yet that is exactly what was done below by the Hawaii State Courts.

Furthermore, the claim in the Opposition Brief, page 12, that "Petitioner's injury cannot be redressed by this Court [thus "moot"] because the Sale was completed almost seven years ago and Haw. Rev. Stat. § 501-118 bars any challenge after the entry of the TCT" is similarly a logic chasing its own tail, for not only would, for instance, TILA

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pursuant to the Supremacy Clause trump any such sale as void, but Petitioner would in any event be eligible for an award of substantial damages against her wrongfully foreclosing mortgagee were this Court to grant her Petition and reverse – hardly a textbook definition of "mootness" or "absence of case or controversy."

2. Petitioner's Constitutional Claims Are Not Barred By Res Judicata.

The Opposition Brief, pages 12-16, next asserts that the doctrine of *res judicata*, now known as issue preclusion in Hawaii, blocks the relief requested here, solely because of, according to the Opposition Brief, Petitioner's failure to challenge the constitutionality of Haw. Rev. Stat. § 667-5 in the Special Proceeding."

Once again, the Opposition Brief is completely factually mistaken as to what occurred in that very early Special Proceeding predating the proceedings below.

The attorney quickly brought into the case by Petitioner's Church caregivers, immediately sought the intervention of the First Circuit Court in Honolulu, on June 17, 2004, filing as an "appeal" in "Special Proceeding No. 04-1-0198" a motion to cancel the nonjudicial foreclosure sale, filed mistakenly pursuant to Section 667-35 of the Hawaii Revised Statutes (Hawaii's alternative nonjudicial foreclosure law), when in fact the nonjudicial sale of Petitioner's residence had been conducted pursuant instead to Section 667-5 of the Hawaii Revised Statutes (the so-called old nonjudicial foreclosure law), which does not provide for any appeal whatsoever to any State Court, which case was assigned to the Honorable Richard W. Pollack for decision, all of which prior proceedings the lower court below took judicial notice of.

On July 27, 2004, by Minute Order, and subsequently by formal Order entered on August 18, 2004, Judge Pollack denied Petitioner's motion to cancel the sale, on the basis that:

> [U]nder HRS § 667-35, any appeal or motion under this statute had to be taken within 30 days of April 23, 2004" [the date of the filing of "Mortgagee's Affidavit of Foreclosure under Power of Sale"]. The instant motion was filed on June 17, 2004, well after the expiration of the 30-day period.

Judge Pollack, however, overlooked the fact, as correctly argued by the opposition in that mistaken Special Proceeding, that his Court had no jurisdiction over said so-called "appeal" in the first place and therefore the power only to dismiss rather than deny, since the special proceeding was as a matter of law filed erroneously with him, the Hawaii State Legislature not having authorized such appeals, nor empowered its Circuit Courts to intervene by way of appeal in Section 667-5 nonjudicial foreclosure cases.

There being no jurisdiction over that Special Proceeding, there could be no *res judicata* effect as Judge Pollack had no power to decide anything and could not decide anything, and in fact decided however mistakenly only that he had no jurisdiction, *albeit* mistakenly, on erroneous grounds.

It compounds error, as the Opposition does, to try to fault Petitioner or her replacement counsel here, bound by the requirements of Rule 11, for not appealing Judge Pollack's otherwise erroneous reasoning in the Special Proceeding when he had no jurisdiction to decide anything and did not decide anything by any stretch of advocacy in any way related to any issue in these proceedings.

Moreover, the Hawaii State Appellate Courts below (their opinions are set forth in the Appendix to the Petition), neither considered nor based their decisions upon the doctrine of *res judicata*, but ruled solely and exclusively as a result of the *Aames* decision being challenged here.

3. The Actions Below Were "State Action."

The Opposition Brief, pages 17-23, is forced to argue, incredibly, that the promulgation of a state statute, interpreted and enforced by a state's appellate courts so as to block its trial courts from even considering a borrower's arguments and proof that its lender violated its contractual promises and that its lender violated federal consumer protection laws once title has been transferred, even though the borrower was unaware of the transfer of title and/or had insufficient time and means to object, is not "state action," when without such a state statute a borrower would be able to do so.

Thus, by doing so, the State of Hawaii, contrary to merely enforcing private contractual agreements, is actually overriding private contractual agreements as well as attempting to override the Supremacy Clause by defeating Congressional statutory consumer rights, under the guise of doing the exact opposite, thereby intervening by "state action" in the private common law rights and federal consumer rights of Hawaii borrowers whose real property just happens to be registered in Land Court.

Although not directly essential for these proceedings, but also highlighted in the Petition, is the similar deceitful manner in which Fannie Mae and Freddie Mac, "sponsored" by the Federal Government and armed only with U.S. Treasury money, whose defalcations have now become legendary, have been similarly able to escape needed judicial oversight through the unjustified legal

fiction that their conduct also has not involved "state action."

On the other hand, Fannie Mae and Freddie Mac have together controlled the vast majority of mortgage lending in the United States and the lawyering of even private foreclosure attorneys nationally, to the extent of determining even how much they are allowed to charge and ordering them with express written directives and retention agreements to use only nonjudicial foreclosure remedies in Hawaii.

C. Conclusion

The mortgage crisis in the United States threatens to undue in two years' time what it took this Nation more than 200 years to build -- the wealthiest, the strongest, and the most robust economy in the history of the world.

Now that economy is under unprecedented attack.

Virtually every mounting financial problem facing this Nation today, including unprecedented unemployment, rising inflation, depressed growth, and 13% of this Nation's housing units uninhabited, can be traced back to the collapse of the securitized secondary mortgage market and our archaic foreclosure enforcement processes inherited from 14th and 15th century harsh English common law, no more draconian an example of which is Hawaii's ancient 1874 nonjudicial foreclosures law.

Respectfully submitted,

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